

90-1040

Supreme Court of the
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JUAN ANTONIO PENA
and NOE SANTANA,
Petitioners

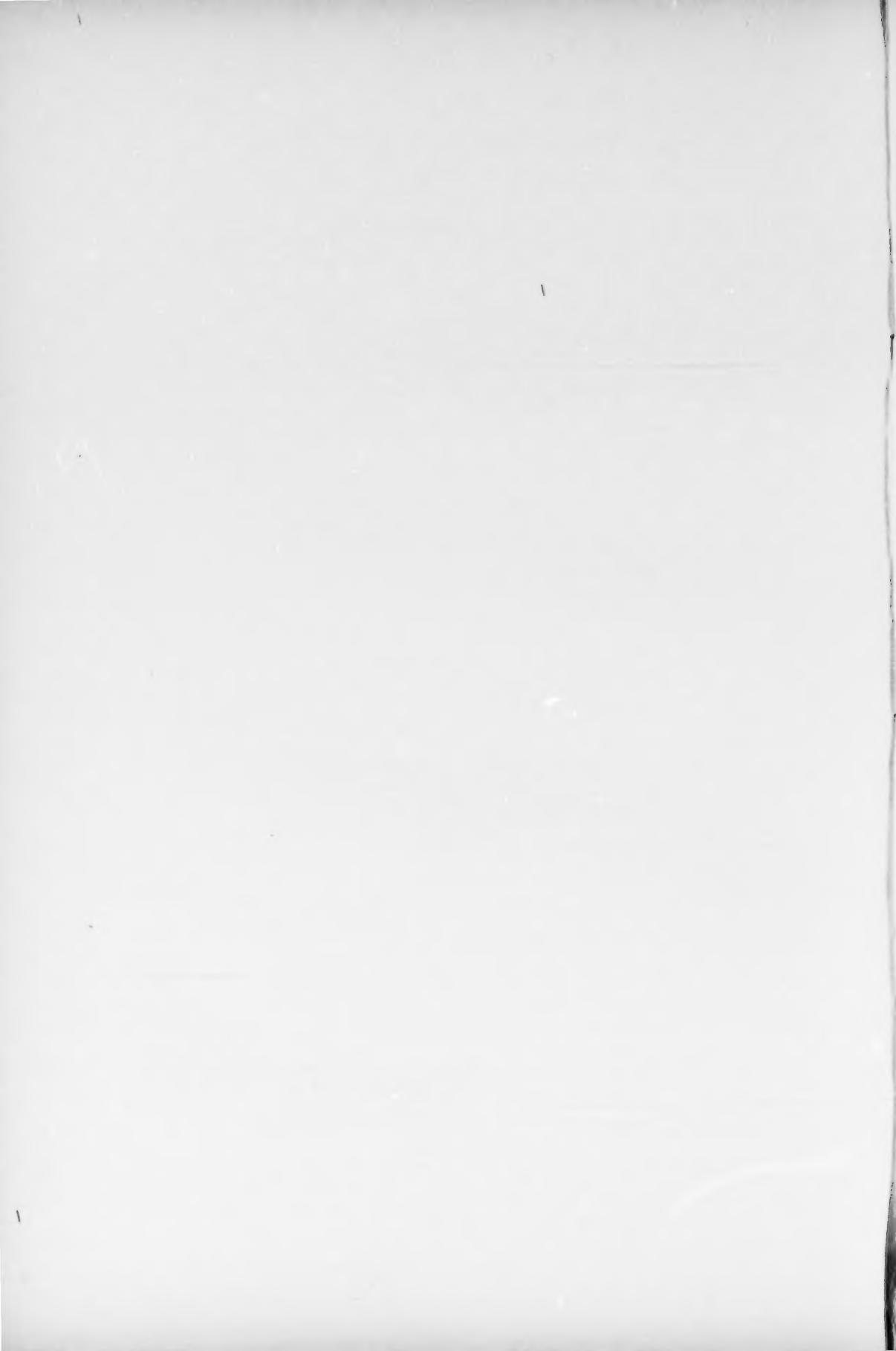
v.

THE STATE OF TEXAS
Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS**

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QUESTIONS PRESENTED

1. Did the Texas Court of Criminal Appeals err in refusing to grant discretionary review of a ruling by the Court of Appeals for the First District of Texas and 209th Harris County District Court refusing to grant a surety a remittitur of a forfeited bail bond when the surety re-apprehended and delivered the principal to the custody of the government and the government subsequently released the principal over the objection of the surety.
2. Whether the conduct of the government in placing a principal beyond the reach of a surety constitutes a taking of property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution.
3. Whether the laws of the State of Texas and the conduct of the government in placing a principal beyond the reach of a surety impairs the obligation of a contract between the surety and the government in violation of Article I, Section 10 of the United States Constitution.

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JUAN ANTONIO PENA
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v.

THE STATE OF TEXAS
Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS**

The petitioner, NOE SANTANA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the First District of Texas entered in this proceeding December 14, 1989, and a subsequent order refusing discretionary review dated May 30, 1990 and order denying motion for rehearing dated September 12, 1990, by the Texas Court of Criminal Appeals.

OPINIONS BELOW

The judgment of the 290th District Court of Harris County, Texas, dated March 15, 1989, in cause number 417652-A is not published but is included in the Appendix of this petition. The opinion of the Court of Appeals for

the First District of Texas dated December 14, 1989, in cause number 01-89-00687-CV affirming the judgment of the trial court is not published and is included in the Appendix of this petition. The orders of the court of appeals overruling the motion for rehearing on February 15, 1990 and the Texas Court of Criminal Appeals refusing the petition for discretionary review on May 30, 1990 and denying the motion for rehearing on September 12, 1990 are not published but are included in the Appendix of this petition.

JURISDICTION

The judgment of the Court of Appeals for the First District of Texas was entered on December 14, 1989. A motion for rehearing was overruled on February 15, 1990. On May 30, 1990, the Texas Court of Criminal Appeals entered an order refusing a petition for discretionary review. An order denying a motion for rehearing was entered by the Texas Court of Criminal Appeals on September 12, 1990. The petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10 of the United States Constitution provides:

No state shall . . . pass any . . . law impairing the obligation of contracts. . . .

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 22.16 of the Texas Code of Criminal Procedure (1965) provided:

If, before final judgment is entered against the bail, the principal appears or is arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond if the arrest or appearance is a direct result of money spent or information furnished by the surety or is because of the principal's initiative in submitting himself to the authority of the court, sheriff, or other peace officers.

Article 22.16 of the Texas Code of Criminal Procedure (effective June 20, 1987) provides:

(a) After forfeiture of a bond and before the expiration of the time limits set by Subsection (c) of this article, the court shall, on written motion, remit to the surety the amount of the bond . . . as provided by Subsection (e) of this article if: (1) the principal is incarcerated in the county in which the prosecution is pending; (2) the principal is incarcerated in another jurisdiction and the incarceration is verified as provided by Subsection (b) of this article; . . .

(b) For the purpose of Subsection (a)(2) of this article, a surety may request confirmation of the incarceration of his principal by written request to the law enforcement agency of the county where prose-

cution is pending. A law enforcement agency in this state that receives a request for verification shall notify the court in which prosecution is pending and the surety whether or not the principal is or has been incarcerated in another jurisdiction and the date of the incarceration.

STATEMENT OF THE CASE

On April 26, 1985, the Petitioner NOE SANTANA executed a bail bond as surety in behalf of JUAN ANTONIO PENA, to answer a felony charge of delivering drugs. The amount of the bail bond was \$245,000.00. On May 6, 1985, the principal did not appear in 209th District Court of Harris County, Texas, and the court declared a forfeiture of the bond. On June 7, 1985, as a result of money spent and information furnished by surety, the principal was captured in Mexico and delivered to the custody of U.S. federal officers at the Mexico/United States border in Hidalgo County, Texas. The U.S. federal officers subsequently released the principal to return to Mexico with the result that the principal never returned to Harris County to answer his felony accusation or bond forfeiture.

On December 10, 1988, the trial court, Honorable Michael T. McSpadden presiding, conducted a hearing. In his Answer, the petitioner asserted that based upon Article 22.16 of the Texas Code of Criminal Procedure and the equities of this case, he was entitled to a remittitur of all or a portion of the forfeited bond. The petitioner also claimed in his Answer that the obligations of his bond were more onerous than was required by law and would not support a forfeiture. At the hearing the uncontradicted

testimony of the surety and a Mexican federal police officer showed that as a result of the surety's efforts the principal was captured in Mexico and returned to the custody of U.S. federal officers within thirty-two (32) days of the principal's bond forfeiture. However, the trial court found that, based on Article 22.16 of the Texas Code of Criminal Procedure (which was in effect on the date of the bond forfeiture and subsequent hearing), the Court had no discretion to exonerate or remit any amount of the bond to the surety since the principal had not been returned to the custody of Harris County, Texas. The trial court subsequently granted a final judgment for the full amount of the bond on March 15, 1989. The surety subsequently filed a motion for new trial in which he asserted that "[t]o hold that the Government could release a defendant or could hold a defendant in a county other than the county of prosecution, and then complain that the defendant was not returned to the proper county, and then be able to collect a forfeiture which is otherwise defensible is a taking of property without due process of law." The petitioner's motion for new trial was subsequently overruled by operation of law.

On appeal, the petitioner again urged that based on the actions of the government, he was entitled to a remittitur of all or part of the forfeited bond. However, the Court of Appeals for the First District of Texas in an unpublished opinion affirmed the trial court's ruling. A motion for rehearing filed December 28, 1989, was subsequently overruled by the Court of Appeals on February 15, 1990. On May 30, 1990, the Texas Court of Criminal Appeals refused petitioner's petition for discretionary review and on September 12, 1990, it denied petitioner's motion for rehearing.

REASONS FOR GRANTING CERTIORARI

This petition raises a substantial and important question concerning the rights of a surety to obtain relief from a bail bond forfeiture when the surety reapprehends the principal in another country, delivers the principal to the custody of the government and makes an objection to the government's subsequent release of the principal. Persons engaged in the business of acting as bail bond sureties should not have their property taken by the arbitrary actions of the government in releasing principals from bail bond obligations.

This petition should be granted because the rulings of the trial court, the Court of Appeals for the First District of Texas and the Texas Court of Criminal Appeals have decided a federal question in a way that conflicts with an applicable decision of the United States Supreme Court in *Reese v. United States*, 76 U.S. 541, 9 Wall. 13 (1869). The United States Supreme Court's decision in *Reese v. United States* regarding the discharge of a surety's obligations on a bond when the government places the principal beyond the reach of his surety has been the accepted law for over 120 years in the United States. The decisions of the Texas courts set forth in this petition reverse this long accepted practice.

The United States Supreme Court should rule unequivocally that a surety is discharged from a bail bond obligation when the government consents that a principal in a criminal action may depart out of the territory of the United States beyond the reach of the surety. To allow decisions to the contrary to stand would amount to a taking of property without due process of law and would impair the obligation of the contract between the surety and the government.

1. DID THE TEXAS COURT OF CRIMINAL APPEALS ERR IN REFUSING TO GRANT DISCRETIONARY REVIEW OF A RULING BY THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS AND 209th DISTRICT COURT OF HARRIS COUNTY, TEXAS, BY REFUSING TO GRANT A SURETY A REMITTITUR OF A FORFEITED BAIL BOND WHEN THE SURETY REAPPREHENDED AND DELIVERED THE PRINCIPAL TO THE CUSTODY OF THE GOVERNMENT AND THE GOVERNMENT SUBSEQUENTLY RELEASED THE PRINCIPAL OVER THE OBJECTION OF THE SURETY?

ARGUMENT

The undisputed facts of this case show that by coordinating with a Mexican federal police officer, the surety was able to locate, capture and return the principal from Mexico to the custody of U.S. federal officers in Hidalgo County, Texas, within thirty-two (32) days of the principal's failure to appear for a court setting in Harris County, Texas. Although the surety had attempted to obtain a federal warrant from local, state and federal law enforcement officials, he had been unsuccessful. However, even though the surety provided the U.S. federal officers with documentation of the Texas felony charges, the U.S. federal officers released the principal to return to Mexico despite objections of the surety.

At the time the principal failed to appear in court, the relevant Texas bond forfeiture remittitur statute provided:

If, before final judgment is entered against the bail, the principal appears or is arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond if the arrest or appearance is a direct

result of money spent or information furnished by the surety or is because of the principal's initiative in submitting himself to the authority of the court, sheriff, or other peace officers. TEX. CRIM. PROC. ANN., Art. 22.16 (1965).

At the time of the bond forfeiture final hearing, the relevant Texas bond forfeiture remittitur statute had been amended to provide:

(a) After forfeiture of a bond and before the expiration of the time limits set by Subsection (c) of this article, the court shall, on written motion, remit to the surety the amount of the bond . . . as provided by Subsection (e) of this article if: (1) the principal is incarcerated in the county in which the prosecution is pending; (2) the principal is incarcerated in another jurisdiction and the incarceration is verified as provided by Subsection (b) of this article; . . .

(b) For the purpose of Subsection (a)(2) of this article, a surety may request confirmation of the incarceration of his principal by written request to the law enforcement agency of the county where prosecution is pending. A law enforcement agency in this state that receives a request for verification shall notify the court in which prosecution is pending and the surety whether or not the principal is or has been incarcerated in another jurisdiction and the date of incarceration. TEX. CRIM. PROC. CODE ANN., Art. 22.16 (1987).

The government, trial court and the court of appeals interpreted the phrase "proper county" in the earlier version of Article 22.16 to require the surety to return the principal to the county where the prosecution was pending (i.e. Harris county). The government argued for this requirement even though the government's conduct made it

impossible for the surety to comply. As the United States Supreme Court has noted, a denial of due process results where inherently vague statutory language permits selective or arbitrary enforcement. *Smith v. Goguen*, 415 U.S. 566, 576, 39 L.Ed.2d 605, 94 S. Ct. 1242 (1974).

The government, trial court and the court of appeals took the position that the surety failed to comply with the second version of Article 22.16 by not providing verification of the principal's incarceration by a foreign jurisdiction to the court in which the prosecution was pending. Since the government released the principal the same day that it received custody, such a request for verification would have been pointless.

2. WHETHER THE CONDUCT OF THE GOVERNMENT IN PLACING A PRINCIPAL BEYOND THE REACH OF A SURETY CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ARGUMENT

The due process clause of the United States Constitution "emphasizes fairness between the State and the individual dealing with the State." *Ross v. Moffitt*, 417 U.S. 600, 609, 41 L.Ed.2d 341, 350, 94 S. Ct. 2437 (1974). Property involves more than ownership of realty, chattels, or money. It also includes legitimate claims of entitlements (i.e. interests already acquired in specific benefits) under applicable local, state or federal law. Property interests are created and defined "by existing rules or understandings that stem from an independent source such as

state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561, 92 S. Ct. 2701 (1972). In analyzing the nature of a property interest, the Court has noted that “the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause.” *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, 71 L.Ed.2d 265, 274, 102 S. Ct. 1148 (1982).

Both versions of Article 22.16 of the Texas Code of Criminal Procedure clearly provided the petitioner with an understanding that he would be entitled to a remittitur of his \$245,000.00 bail bond forfeiture if he located and caused the principal to be incarcerated. He also had a clear understanding and even an implied covenant with the government that the government would not in any way interfere with his obligations under his bail bond, increase the risks or make the obligations more onerous. *Reese v. United States*, 76 U.S. 541, 544, 9 Wall. 13 (1869). The petitioner’s actions in traveling to Mexico, locating the principal with the assistance of a Mexican federal police officer and causing the principal to be rearrested and placed in the custody of the government show that the petitioner relied on his entitlements to a remittitur under state law and covenant of noninterference from the government.

The petitioner could never have anticipated that if he complied with the obligations of his bond and Texas law in returning his principal to custody, the government would frustrate his efforts by releasing the principal to return to a foreign country. Neither could the petitioner have anticipated that the government would still insist

that he pay the full amount of a \$245,000.00 bond forfeiture. The petitioner did not make an agreement that he would violate U.S. customs and immigration laws by covertly entering the United States with his principal in order to comply with a questionable interpretation of Texas bond forfeiture remittitur laws. As this Court noted in *Reese*, the "power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent." *Id.* at 544. The government's conduct in releasing the principal and causing him to be placed in a foreign country beyond the reach of the petitioner constitutes a taking of petitioner's property entitlements in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Even if the petitioner were to repeat his actions in locating and returning the principal to the custody of the government, there is no indication that the results would be any different. Since neither the state or federal government had obtained a federal warrant in the 3½ years from the date of the principal's failure to appear on May 6, 1985, to the bond forfeiture hearing on December 10, 1988, the surety would only risk his life, spend more money and waste his time in another exercise of frustration.

3. WHETHER THE LAWS OF THE STATE OF TEXAS AND THE CONDUCT OF THE GOVERNMENT IN PLACING A PRINCIPAL BEYOND THE REACH OF A SURETY IMPAIRED THE OBLIGATION OF A CONTRACT BETWEEN THE SURETY AND THE GOVERNMENT IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION

ARGUMENT

A. The Decisions Below Conflict With the Decisions Of The Supreme Court In *Reese v. United States*, 76 U.S. 541, 9 Wall. 13 (1869).

In 1857, Jose Limantour was indicted on various criminal forgery charges and released on \$35,000.00 bail with Michael Reese as surety. The alleged forgeries were based on a 1843 Mexican land grant which when reviewed by the American government showed that Limantour owned three-fourths of the city of San Francisco including the 36 square miles lying south of California Street, Alcatraz Island, Yerba Buena Island, the Furrollones Islands and Tiburon. The United States was represented by Edwin M. Stanton who would later be President Grant's choice for the Supreme Court. 68 A.B.A.J. 960, 961 (1982). The criminal charges were postponed pending resolution of civil cases involving similar matters. The postponement was without the concurrence of the surety. Limantour returned to Mexico during the postponement and decided to stay there when the criminal charges were reset. In a subsequent forfeiture of the bail, Justice Stephen J. Field, sitting as a circuit judge, denied Reese's claim for a remittitur. However, the U.S. Supreme Court in a later ruling authored by Justice Stephen J. Field ruled that the stipulation to postpone the criminal charges, without the concurrence of the surety, discharged the surety from his obligations under his bond. By consenting that Limantour might return to Mexico, without the consent of the surety, where it would be impossible for the surety to surrender and arrest him, the government altered and impaired the obligation of the bail bond contract. The Court concluded that "[i]t would be against all principle and all justice to allow the Govern-

ment to recover against the sureties for not producing their principal when it had itself consented to his placing himself beyond their reach and control." *Reese v. United States*, 76 U.S. 541, 544, 9 Wall. 13 (1869).

As noted earlier, the Court in *Reese* recognized the existence of two implied covenants in any bail bond contract. The first was that the principal would not leave the United States without the assent of the surey. The second was that the government would "not in any way interfere with the covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him." *Id.* at 544. The Supreme Court later noted that where the performance of a bail bond condition is rendered impossible by an act of the obligee or the act of the law, a surety will be exonerated. *Taylor v. Taintor*, 83 U.S. 366, 369, 16 Wall. 366, 21 L.Ed. 287 (1873).

The facts involving the petitioner and the surety in *Reese* are very similar. For their respective time frames, both bail bonds involved significant amounts of money. In each case the government consented, either without the assent or over the objection of the surety, to the principal returning to Mexico. In both cases the actions of the government placed the principal beyond the reach of the surety. However, in *Reese*, the U.S. Supreme Court ruled that the surety must be discharged from liability, whereas, in the petitioner SANTANA's case the Texas courts have ruled that the petitioner must pay the full amount of the forfeited bail bond and the Court has no discretion to grant any remittitur to the petitioner.

B. Where The Government Consents That A Principal In A Criminal Action May Depart Out Of The Territory Of The United States To A

Foreign Country, Beyond The Reach Of The Surety, Without The Consent Of The Surety, The Surety Is Discharged From The Obligation Of The Bail Bond.

The Fourteenth Amendment imposes no more or less stringent requirements upon state officials than does the Fifth Amendment upon their Federal counterparts. *Paul v. Davis*, 424 U.S. 693, 702 n.3, 47 L.Ed.2d 405, 414 n.3, 96 S. Ct. 1155 (1976). In this regard, it should not make any difference whether the bond forfeiture occurred in a federal or state forum. Under the general law of suretyship and the well-settled law of *Reese v. United States* which has remained unimpaired for over one hundred twenty (120) years, a surety is entitled to be discharged from a bail bond obligation where the government, without the consent of the surety, consents to a principal departing the United States to a foreign country.

CONCLUSION

This court should exercise its discretion, grant the petition for writ of certiorari and reverse the rulings of the Texas courts by granting petitioner a discharge from the obligations of his bail bond.

Respectfully submitted,

By: _____

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APPENDIX A

OPINION

**IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS**

NO. 01-89-00687-CV

JUAN ANTONIO PENA, ET AL., Appellants

v.

THE STATE OF TEXAS, Appellee

**On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 417652-A**

This is an appeal from a bail bond forfeiture. We affirm.

On April 26, 1985, Noe Santana executed a bail bond, binding himself to pay \$245,000 plus other fees and expenses to the State of Texas, if Juan Antonio Pena did not appear in court on May 6, 1985, to answer a felony charge of delivering drugs. Pena did not appear at the appointed time and, on May 7, 1985, the trial court entered a judgment forfeiting the bond.

In answer to the State's citation on Santana to show cause why the judgment of forfeiture should not be made final, he pleaded for, among other things, a remittitur of the amount of the bond pursuant to article 22.16 Tex. Code Crim P. Ann. (Vernon 1989). The trial court held a hearing on December 10, 1988. A Mexican federal policeman and Santana testified that Pena had been captured in Mexico, and then delivered into the custody of a U.S. immigration officer in Hidalgo County, Texas.

Santana testified that he informed the immigration officer of, and provided him with documentation of, the charges pending against Pena in Harris County. Santana testified he called his office to try to get a three-way phone conversation with the judge in Harris County, but that the immigration officer said he was a federal officer and did not have to listen to a district judge. The immigration officer checked, and after discovering there were no federal warrants pending for Pena, released him. Santana testified that he and his son had spent a month in Mexico, personally doing the investigation to capture Pena.

The court delayed acting on the final judgment of forfeiture for ninety days to give Santana additional time to reapprehend Pena. On March 15, 1989, Pena not having been returned to custody, the court entered a contested final judgment finalizing the bond forfeiture.

Appellant complains, in two points of error, that the court erred in not remitting the amount of the bond pursuant to article 22.16, because he effected the return to custody of Pena to Hidalgo County, Texas.

At the time the bond was executed, article 22.16 read in part:

If, before final judgment is entered against the bail, the principal appears or is arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond if the arrest or appearance is a direct result of money spent or information furnished by the surety or is because of the principal's initiative in submitting himself to the authority of the court, sheriff or other peace officers.

Tex. Code Crim. P. Ann. (1965).

The State argues, that because the statute refers to "the proper county" rather than "a proper county," the proper county must be Harris, the county where the proceeding is pending. Accordingly, the State's position is that because Pena was not lodged in the Harris County jail, the court's denial of the remittitur was correct.

Appellant argues that article 22.16 was amended effective June 20, 1987, prior to the date the judgment of forfeiture was finalized. The statute, as amended, reads in pertinent part:

(a) After forfeiture of a bond and before the expiration of the time limits set by Subsection (c) of this article, the court shall, on written motion, remit to the surety the amount of the bond . . . as provided by Subsection (e) of this article if: (1) the principal is incarcerated in the county in which the prosecution is pending; (2) the principal is incarcerated in another jurisdiction and the incarceration is verified as provided by Subsection (b) of this article;

(b) For the purpose of Subsection (a)(2) of this article, a surety may request confirmation of the incarceration of his principal by written request to the law enforcement agency of the county where prosecution is pending. A law enforcement agency in this state that receives a request for verification shall notify the court in which prosecution is pending and the surety whether or not the principal is or has been incarcerated in another jurisdiction and the date of incarceration.

Tex. Code Crim. P. Ann., article 22.16 (Vernon 1989).

Appellant contends that when Pena failed to appear on May 7, 1985, the court forfeited the bond, and the State acquired rights under the bond, but that such rights did

not vest until the final judgment of forfeiture was entered March 15, 1989. To support this contention, appellant points to such events as death of the principal, under article 22.13, or rearrest under article 22.16, which could affect the State's right to the bond proceeds.

Accordingly, appellant argues that the amended version of article 22.16, effective June 20, 1987, applies to the remittitur issue. Under that provision, which specifies that the return of the principal can be either to the county in which the prosecution is pending, or to another jurisdiction, appellant argues that Pena's delivery to the immigration officer in Hidalgo County satisfies article 22.16 and justifies the remittitur.

Appellant's contention that the State's right to the bond proceeds did not vest on May 7, 1985, is erroneous. Once Pena breached the bond by failing to appear, he and Santana, as surety, became bound by the forfeiture under the terms of the bond, to pay into the court the amount of the bond. 132 Tex. Crim. 415 *Rippey v. State*, 104 S.W.2d 850, 852 (Tex. Crim. App. 1937). The State's interest in the bond proceeds having vested in 1985, the 1987 amendment of article 22.16 cannot be applied retrospectively to change the State's right to the bond proceeds. *Morin v. State*, 770 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1989 pet. granted); *Keith v. State*, 760 S.W.2d 746 (Tex. App.—Fort Worth 1988, no pet.); *Cardenas v. State*, 683 S.W.2d 128 (Tex. App.—San Antonio 1984, no pet.).

Even assuming appellant is correct, that the 1987 amended version of article 22.16 applies to this case, appellant did not fulfill the requirement, pursuant to subsection (a)(2) and subsection (b) of that article, that the

principal's incarceration be verified by the foreign jurisdiction to the court in which the prosecution is pending. The record reflects that appellant testified that he called his office for the purpose of establishing a three-way conversation between the border patrol officer and the Harris County judge, but that the officer declined. No verification as called for the statute occurred.

The judgment is affirmed.

/s/ **D. CAMILLE DUNN**
D. Camille Dunn
Justice

Justice Bass and O'Connor also participating
Do not publish. Tex. R. App. P. 90.
Judgment rendered and opinion delivered Dec. 14, 1989.
True copy attest:
/s/ Kathryn Cox, Clerk.

APPENDIX B

NO. 417652-A

**IN THE 209th DISTRICT COURT OF
HARRIS COUNTY, TEXAS**

THE STATE OF TEXAS

v.

JUAN ANTONIO PENA, et al

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The Court hereby makes the following Findings of Fact and Conclusions of Law in this Cause:

- 1) The bond forfeited in this Cause was executed by the Defendant-Principal, Juan Antonio Pena, and his Sureties, Noe Santana and Jose Jimenez, on April 26, 1985 in the amount of \$245,000.00, to be paid to the State of Texas upon the Defendant-Principal's failure to appear.
- 2) The Defendant-Principal was required to appear before this Court on May 6, 1985 to answer a felony indictment but failed to answer or appear after his name was duly called. After waiting a reasonable amount of time for the defendant-principal's appearance the bond was declared forfeited and a Judgment of Forfeiture was signed on May 7, 1985.
- 3) The Defendant-Principal has not been returned to custody.

7a

4) The Defendant-Surety Noe Santana answered and appeared by counsel at trial. The Defendant-Surety Jose Jimenez was not served and did not appear and this cause was dismissed as to Jimenez only.

5) The Defendant-Surety did not file a timely jury request, and trial was had to the Court.

6) After consideration of the pleadings, evidence, and the arguments of counsel for both sides, the Court thereupon found that no good cause existed for the Defendant-Principal's failure to appear and ordered that the Judgment of Forfeiture in the amount of \$245,000.00, plus costs, be made final as to the Defendant-Principal and the Defendant-Surety Santana.

The Court hereby ORDERS that the foregoing Findings of Fact and Conclusions of Laws be entered in part of the record in this Cause.

/s/ MICHAEL T. McSPADDEN
Judge Presiding

APPENDIX C

NO. 417,652-A

**IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
209th JUDICIAL DISTRICT
THE STATE OF TEXAS**

v.

JUAN ANTONIO PENA, ET AL

SUPPLEMENTAL FINDINGS

1. The Court finds that the Defendant, Juan Antonio Pena, was returned from Mexico and placed in custody of U.S. Federal officers in Hidalgo County, Texas, on June 7, 1985.
2. The Court further finds that the Defendant was not returned to Harris County, Texas, but was released to return to Mexico on June 7, 1985.
3. The Court further finds that it has no discretion to remit any sum to the surety since the Defendant was not returned to custody in Harris County.

SIGNED this 22nd day of May, 1989.

/s/ **MICHAEL T. McSPADDEN**
Judge

APPENDIX D

**COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS**

NO. 01-89-00687-CR

JUAN ANTONIO PENA, ET AL, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

ON MOTION FOR REHEARING

On this day came on to be considered appellant's motion for rehearing. And such motion is hereby OVERRULLED.

It is so ordered.

PER CURIAM

Panel consisting of Justices Bass, Dunn and O'Connor.
Order entered February 15, 1990.

APPENDIX F

CLERK'S OFFICE

**COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 0375-90 styled:

**JUAN ANTONIO PENA, PRINCIPAL
NOE SANTANA AND JOSE JIMENEZ, SURETIES**

v.

THE STATE OF TEXAS

On April 10, 1990, the Appellant's Petition for Discretionary Review of the judgment of the court of Appeals for the First Supreme Judicial District of Texas was filed with this Court. On May 30, 1990 the Appellant's Petition for Discretionary Review was Refused and on September 12, 1990 the Appellant's Motion for Rehearing was Denied.

THEREFORE, with the denying of the Appellant's Motion for Rehearing on Petition for Discretionary Review, this cause was disposed of by this Court on September 12, 1990, the Appellant having exhausted all remedies in this, the Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at my office in Austin, Texas this 7th day of December, 1990.

/s/ THOMAS LOWE

THOMAS LOWE, Clerk of the
Court of Criminal Appeal of Texas

By: */s/ Belva Myler, Deputy*

APPENDIX E

Thomas Lowe, Clerk

Court of Criminal Appeals
P. O. Box 12308, Capital Station
Austin, Texas 78711

Mail To: Harold Klein
411 Fannin
Houston, TX 77002

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0375-90

May 30, 1990

**STYLE: Pena, Juan Antonio, Prin. & Santana, Noe &
Jimenez, Jose v. Sureties**

**On this day, the Appellant's Petition for Discretionary
Review has been REFUSED.**

JUDGE TEAGUE WOULD GRANT.

Thomas Lowe, Clerk

APPENDIX G

NO. 417652-A

IN THE 209th DISTRICT COURT OF
HARRIS COUNTY, TEXAS
THE STATE OF TEXAS

v.

JUAN ANTONIO PENA, et al.

CONTESTED FINAL JUDGMENT

ON THIS, the 10th day of March, 1989, came on for trial the above-numbered and entitled cause wherein the State of Texas is plaintiff and JUAN ANTONIO PENA is Defendant-Principal and NOE SANTANA is Defendant-First Surety and JOSE JIMENEZ is Defendant-Second Surety; whereupon Defendant-Principal having been duly notified failed to answer or appear and wholly defaulted, and Defendant-Second Surety was not served and did not appear and Defendant-First Surety answered and appeared by counsel; jury having been waived trial was had to the Court, commencing on December 9, 1988 and being continued to this date at the request of the Defendant-First Surety, and it appearing to the Court after consideration of the pleadings and the evidence offered and admitted herein, including the bail bond and the judgment of forfeiture on file in this cause, that no sufficient cause is shown for the Defendant-Principal's failure to appear on May 6, 1985, to answer the charge by indictment accusing him of a felony and that the judgment of forfeiture heretofore rendered against Defendants Principal and First Surety should be made final, State's Motion to Dismiss as to Defendant-Second Surety is granted.

It is therefore ORDERED, ADJUDGED, and DE-CREED that the State of Texas do have and recover from JUAN ANTONIO PENA as Defendant-Principal and NOE SANTANA as Defendant-First Surety on the bail bond of said Defendant-Principal, jointly and severally, the sum of \$245,000.00 (DOLLARS) and costs of court, for all of which let execution issue. It is further ordered that this cause be dismissed as to the Defendant-Second Surety only.

SIGNED this the 15th day of March, 1989.

/s/ MICHAEL T. McSPADDEN
Judge Presiding

/s/ Signature Illegible
Assistant District Attorney

APPENDIX H

NO. 417652-A

**IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
209th JUDICIAL DISTRICT
THE STATE OF TEXAS**

v.

**JUAN ANTONIO PENA, ET AL
DEFENDANT'S ANSWER**

To The Honorable Judge Of Said Court:

COMES NOW the Defendant-surety and files this Answer and would respectfully show unto the Court as follows:

I.

Defendant generally denies the allegations of Plaintiff's pleadings and demands strict proof of any allegation therein contained.

II.

At the time the bond was forfeited or attempted to be forfeited, the principal on said bond was not required to appear before this Honorable Court or any other court.

III.

Defendant has not consented or given permission to transfer the bond in question from one court to another court or from one case to another case.

IV.

At the time the bond was made, no valid complaint information or indictment existed charging the principal

with a violation of the laws of Texas nor has one existed since said time which would require posting a bond. There exists a fundamental defect in such pleading.

V.

The name of the principal was not duly and distinctly called at the door of the courthouse before the bond was declared forfeited; if Defendant be mistaken, then the Court did not wait a reasonable time for the principal to appear prior to declaring the bond to be forfeited.

VI.

There has been a total lack of consideration between Plaintiff and the principal and such failure also extended to Defendant at the time the bond was made.

VII.

Plaintiff has been guilty of laches in asserting the claim represented by this case and in apprising Defendant of the same.

VIII.

There are no allegations in any pleading of Plaintiff which would support a final judgment.

IX.

Defendant is absolved of liability as provided by Article 17.16, T.C.C.P.

X.

Defendant is entitled to be exonerated under the provisions of Article 22.13, T.C.C.P.

XI.

Defendant is entitled to be absolved of liability under the provisions of Article 2372p-3, Section 13(c).

XII.

Defendant would show that the bail was discharged under the provisions of Article 2372p-3, Section 12(d), V.T.C.S.

XIII.

Defendant is entitled to a remittitur and hereby moves the Court to remit the amount of the bond as provided by Article 22.16, T.C.C.P.

XIV.

Defendant would show that the equities in this case require a remittitur of all or a portion of any judgment which may be rendered by this Honorable Court. Defendant prays the Court, upon its own motion, enter a take nothing judgment.

XV.

Defendant would show that the obligations stated in the bond are more onerous than is required by law and therefore will not support a forfeiture.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff take nothing by this action and he be permitted to go hence with his costs without delay.

/s/ **HAROLD KLEIN**
Harold Klein
Attorney for Defendant
411 Fannin Street, Suite 210
Houston, Texas 77002
Bar Card No. 1158000
713/222-1237

APPENDIX I

NO. 417,652-A

IN THE DISTRICT COURT
OF HARRIS COUNTY TEXAS
209th JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

JUAN ANTONIO PENA, ET AL

Filed April 6, 1989

MOTION FOR NEW TRIAL

To The Honorable Judge Of Said Courts

Now comes NOE SANTANA, surety and one of the defendants and Movant in the above styled and numbered cause and files this his Motion For New Trial and would respectfully show unto the Court as follows:

I.

Your Movant requests that the Court remit the amount of the bond for the reason that the Principal, Juan Antonio Pena, was incarcerated in Hidalgo County, Texas, on June 7, 1985. The testimony in this case shows, without contradiction, that the Principal was brought from Mexico by Mexican Federal officers with the help and instance of Movant and placed in custody with United States Federal officers in Hidalgo County, Texas, on June 7, 1985. Testimony further shows that although the U.S.

officers were in possession of certified copies of the indictment and warrant from this Court and were further privy to N.C.I.C. information showing the wanted status of this Principal, they failed and refused to return the said Principal to Harris County but instead released him to return to Mexico on the same day.

II.

Prior to June 20, 1987, this Court had discretion under Article 22.16, T.C.C.P., before final judgment, to remit the amount of the bond when the principal was lodged in jail of the proper county. Proper county was not defined and could and should logically mean any county where the principal was restrained, particularly since the Government controls the location after arrest or incarceration. In 1987, Article 22.16 was amended to provide that the Court shall remit the amount of the bond if the principal is incarcerated in the County where prosecuted or in another jurisdiction.

The 1987 amendment clarified what was meant by proper county, the effect being that proper county is the incarceration of the principal in the county of prosecution or in another jurisdiction. To hold that the Government could release a defendant or could hold a defendant in a county other than the county of prosecution, and then complain that the defendant was not returned to the proper county, and then be able to collect a forfeiture which is otherwise defensible, is a taking of property without due process of law.

WHEREFORE, PREMISES CONSIDERED, Movants pray that the judgment heretofore entered by this Court

be set aside and held for naught and that they be granted
a new trial in this case.

Respectfully submitted,

/s/ **HAROLD KLEIN**
Harold Klein, TBC No. 11558000
Attorney for Movant
411 Fannin, Suite 210
Houston, TX 77002
(713) 222-1237